UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

OLEAN GENERAL HOSPITAL

and Cases 3-CA-097918

3-CA-104444

3-CA-104462

NEW YORK STATE NURSES ASSOCIATION

Linda M. Leslie, Esq.,

for the General Counsel.

James N. Schmit, Esq., (Jaeckle Fleischmann & Mugel LLP), Buffalo, New York for the Respondent.

Claire K. Tuck, Esq., (Legal Department, New York State Nurses Association), New York, N,Y., for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Buffalo, New York on August 13, 2013. The New York State Nurses Association (the Union) filed the charges in the case on February 7, May 6 and May 7, 2013. The General Counsel issued a consolidated complaint in these matters on July 5, 2013.

The General Counsel alleges that Respondent, Olean General Hospital, violated Section 8(a)(5) and (1) by unilaterally implementing a program in which bargaining unit nurses acted as clinical teachers for nursing students from Alfred State University. The primary issue with regard to this program, the Dedicated Education Unit (DEU), is whether it was sufficiently different than similar programs with other nursing schools, to require notice and an opportunity to bargain with the Union.

The General Counsel also alleges that Respondent violated Section 8(a)((5) and (1) by failing and/or refusing to provide the Union with specific information about the DEU program, to wit: from whom the bargaining unit nurses participating in the program would receive their orders, the type of training that was to be provided to these nurses and the curriculum and weekly expectations for the nursing students.

Unrelated to the DEU program, the General Counsel alleges that Respondent also violated the Act in failing to provide the Union, as it requested, the results of a survey conducted at the hospital on or about March 1, 2013 by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and the deficiencies noted in that survey.

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On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Party Union, I make the following

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FINDINGS OF FACT

I. JURISDICTION

Respondent operates a hospital in Olean, New York, where it annually derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$50,000 from points outside of New York State. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

The DEU Program and related information requests

The New York State Nurses Association has represented the Registered Nurses at
Respondent's hospital since 1996. There currently are about 220 nurses in the bargaining unit.
The Respondent and the Union were parties to a collective bargaining agreement whose term ran from February 1, 2010 to January 31, 2013. Negotiations for a successor contract began in November 2012. As of the August 2013 hearing in this matter, these negotiations were still ongoing. The term of the 2010-2013 contract was extended to May 1, 2013 and then expired.

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In November 2012, Respondent informed Karen Wida, a union representative, that it was creating a new program, the Dedicated Education Unit (DEU), with Alfred State University. On December 2, 2012, a bargaining unit nurse informed Wida that the nurse had been selected to be a clinical instructor for this program. On December 4, 2012, Wida sent a email to Jeffrey Zewe, Respondent's Vice President for Patient Care Services and Chief Nursing Officer, and to Timothy McNamara, Senior Vice President of Human Resources. Wida indicated that Respondent was illegally dealing directly with bargaining unit members and requested negotiations with Respondent about the Alfred State/DEU program.

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Timothy McNamara responded to Wida asserting that the DEU program was consistent with the parties' collective bargaining agreement. Wida disagreed, opining that the DEU program went beyond the terms of the collective bargaining agreement. She indicated that the DEU program was inconsistent with the contract and established past practice in that it made the participating unit nurses adjunct members of the Alfred University staff and called for payment to the nurses from Alfred State. Wida also mentioned other matters not at issue in this case.

On January 2, 2013, Wida sent Respondent an email with an attached list of concerns and questions regarding the DEU program. The email stated, "please see the attached concerns and questions related to the preceptor/internship program and respond to me at your earliest convenience." Items 2 and 7 in the attached list are at issue in this case. They are as follows:

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2. The problem becomes if the nurse is working for both employers at the same time, who do they take their orders from, the hospital or the college? This puts the nurse in a lose/lose situation. They have to protect their license.

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7. What type of education is being provided to the selected nurses to provide the education/clinical experience the college is looking for as well as the curriculum and weekly expectations of the students?

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Respondent never responded to this Union request in writing. Although Respondent promised to provide the information orally, it has not done so. However, Chief Nursing Officer Jeffrey Zewe orally explained the basics of the DEU program to Wida.

A bargaining unit nurse provided Wida with a copy of a November 2012 letter from

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DEU program. This letter explains that a nurse selected for the program will be a representative of Alfred and the DEU program, as well as an employee of Respondent. Interested nurses were instructed to fill out an application. They were also informed that selections would be made pursuant to interviews with officials from the college and the hospital and that those selected would be required to attend a mandatory orientation program given by Alfred State faculty

Alfred State University to the unit nurses who might be selected to be clinical trainers in the

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The DEU program started in January 2013 and ran through May. Respondent selected 7 bargaining unit nurses to serve as trainers for the Alfred students. They were supposed to be with their students for 36 hours every two-week pay period. These nurses received \$1,000 from Alfred State in addition to their wages from the hospital.

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Respondent has had agreements with other educational institutions that allowed nursing students to gain practical experience in the hospital. These agreements were not negotiated with the Union. These agreements differed from the DEU program in that the nurses who oversaw student nurses at the hospital were not required to sign an agreement with the educational institution, were not paid by the school and were not required to attend training given by the school. Also, unlike other training programs for student nurses, no clinical instructor from Alfred State was present during the on-site training of the student nurses.

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Section 10.13 of the parties' 2010-2013 collective bargaining agreement provides:

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An employee who is assigned the responsibilities of preceptor of a graduate nurse, registered nurse or student nurse intern shall be paid a differential of one dollar (\$1.00) per hour while working in said assignment. To be assigned preceptor, an employee must successfully complete the in-service program for preceptors.

The Joint Commission survey

On March 1, 2013, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) performed an unannounced survey at Respondent's hospital. The JCAHO is a private regulatory body that inspects hospitals to determine the quality of patient care and the adequacy of safety measures. Although participation in a JCAHO survey is voluntary, there is a substantial incentive to participate. JCAHO surveys a hospital approximately every three years. If a hospital does not participate in a JCAHO survey they will be surveyed annually by the Centers for Medicare and Medicaid.

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The JCAHO informed the hospital of its preliminary findings immediately following completion of the survey. In late March JCAHO sent the hospital its final report. JCAHO found 40-43 deficiencies involving patient care. On March 4, after learning about the March 1 survey from bargaining unit nurses, union representative Dennis Zgoda sent Respondent a letter requesting a copy of the report and a list of all deficiencies noted in the survey.

On March 6, Timothy Finan, President and CEO of Olean General Hospital, sent a memo to the Departments of Surgery, Anesthesiology and the Surgical Nursing Staff. Finan discussed deficiencies noted by the JCAHO. These deficiencies were failure to appropriately identify patients prior to procedures, failure to assess patients prior to moderate sedation and failure to update certain documentation prior to a procedure. Finan informed his staff that there would be zero tolerance for failure to take corrective action.

On March 8, VP Timothy McNamara responded to the request by informing Zgoda that his request had been referred to the hospital's attorneys. Respondent provided no further response to the Union's request for the JCAHO survey and list of deficiencies.

Analysis

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The DEU program is sufficiently distinguishable from other student nursing programs to require notice and an opportunity to bargain.

It is true that the Union and Respondent had not negotiated previous arrangements between the hospitals and nursing schools. However, the DEU program with Alfred State is sufficiently different from those other arrangements that Respondent was obligated to provide the Union with prior notice and an opportunity to bargain over the implementation of the DEU program.

As the Union contends, no prior program for student nurses involved having unit nurses sign an agreement with the educational institution. No prior program required the unit nurse to be trained by the school or provided for payment to the nurses by the school. Other training programs included oversight by an on-site instructor from the institution.

Respondent's argument that the DEU program is covered by Section 10.13 of the contract is belied by the fact that the contract does not provide for a \$1,000 payment to the nurse from any educational institution. This is essentially the granting of a unilateral wage increase to a small number of bargaining unit members.

The JCAHO survey is not protected from disclosure by state statute and its contents are potentially relevant to the union's responsibilities as exclusive bargaining representative of Respondent's nurses.

Respondent argues that it need not produce the JCAHO survey because it is not relevant to the Union's responsibilities. However, the record reflects that staffing has been a major issue in contract negotiations. The deficiencies noted in the JCAHO may at least arguably be related to staffing issues. Respondent's witness, Diane Haughney, conceded that the number of RNs working on any given unit can impact the patient care provided, Tr. 75-76. Thus, the record establishes the potential relevance of the report. Potential relevance is all that must be shown to entitle the Union to this survey, *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). Therefore, I conclude that the Union is entitled to the JCAHO report and a list of the deficiencies found in the survey unless that Respondent is justified in refusing to produce the survey on confidentiality grounds.

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Confidentiality of the JCAHO survey

The general rules regarding employer claims of confidentiality are set forth in *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). Substantial claims of confidentiality may justify refusals to furnish otherwise relevant information. Confidential information is limited to a few general categories: that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that is which is traditionally privileged, such as memoranda prepared for pending lawsuits, *Id.*, at page 1073. The JCAHO survey fits into none of these categories.

Respondent's claim of confidentiality rests solely on the contention that disclosure is precluded by Section 6527(3) of the New York Education Law, citing *Borgess Medical Center*, 342 NLRB 1105 (2004). However, this statute does not, on its face, prohibit disclosure of the JCAHO survey to the Union and Respondent provides no other grounds for claiming confidentiality.

Section 6257(3) in pertinent part states that "Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health ...shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law."

The Union is not seeking disclosure of the survey results under article thirty-one of the New York civil practice law. It seeks production of the survey under the NLRA. Thus Section 6257(3) is completely irrelevant to this case. Moreover, assuming this section is relevant, it

¹ Respondent did not raise this defense until it filed its Answer to the Consolidated Complaint on July 19, 2013. Prior to that, it simply ignored the Union's request for the survey. Generally, if an employer had a legitimate confidentiality concern, it must notify the union promptly and explore the possibility of an accommodation of its confidentiality concerns and the union's need for the information.

expressly exempts disclosure under other provisions of law, such as the Section 8(a)(5) of the NLRA. Respondent is thus in violation of the Act, as alleged, in withholding the report.

CONCLUSIONS OF LAW

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- 1. By failing to timely notify the Union and afford it an opportunity to bargain about the decision to implement the DEU program, Respondent violated Section 8(a)(5) and (1) because that program differed materially from prior programs and what is contemplated by the parties' collective bargaining agreement.. These material differences are the requirement that nurse/preceptors sign an agreement with Alfred State University, that nurses/preceptors would be paid \$1,000 by Alfred State, that nurse/preceptors would be required to be trained by Alfred State and that nurse/preceptors would train student nurses without the presence of an on-site instructor from Alfred State.
- 2. Respondent also violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith with the Union by not furnishing the Union with relevant information it had requested concerning the JCAHO survey and the DEU program.
- On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

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The Respondent, Olean General Hospital, Olean, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Failing to timely notify the Union and afford it an opportunity to bargain over the implementation and effects of the implementation of the DEU program;

(b) Failing and refusing to bargain in good faith with the Union by refusing to furnish

the Union with relevant information it had requested; and,

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- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) If requested by the Union, rescind the DEU program;

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (b) Provide the Union with notice and an opportunity to bargain over the decision to implement and the effects of the implementation of the DEU program;
- (c) Furnish the Union the information it requested in its January 2, 2013 email, set
 forth in paragraph 2 and 7 of its attachment to that email, and the JCAHO survey and list of deficiencies noted by JCAHO.
 - (d) Within 14 days after service by the Region, post at its Olean, New York hospital copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 2013.
 - (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 24, 2013.

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Arthur J. Amchan
Administrative Law Judge

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the New York State Nurses Association as the exclusive bargaining representative of all our full-time, regular part-time and per diem staff and temporary Registered Nurses and Graduate Nurses, by making changes in your terms and conditions of employment without first giving the Union notice and an opportunity to bargain about such changes and the effects of those changes, including the unilateral implementation of the DEU program for bargaining unit employees.

WE WILL NOT fail or refuse to provide the Union with information that it has requested that is relevant to its role as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, if requested by the Union, rescind the unilateral implementation of the DEU program and WE WILL provide the Union notice and an opportunity to bargain about the DEU program, including its effects.

WE WILL provide the Union with the information it requested about the DEU program on January 2, 2013 in paragraphs 2 and 7 of the attachment to its email request and the written reports by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) of its 2013 survey and any list of deficiencies found by the JCAHO.

		OLEAN GENERAL HOSPITAL		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2387

ding., 130 S. Elmwood Avenue, Suite 630, Βuπalo, NY 14202-238. (716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.